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J.S., Appellant)	
)	
and)	Docket No. 14-1980
)	Issued: April 17, 2015
TENNESSEE VALLEY AUTHORITY,)	
SHAWNEE STEAM PLANT, Chattanooga, TN,)	
Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On September 15, 2014 appellant filed a timely appeal from an August 22, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As the last merit decision was issued in this case on February 23, 2009, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 10, 2008 appellant, then a 60-year-old assistant unit operator, filed an occupational disease claim alleging that he suffered from hearing loss as a result of exposure to excessive noise while working in the basement of a steam plant. He first became aware of his condition and realized it resulted from his employment on April 1, 2006. Appellant indicated that the date of his last exposure was March 16, 2006.

In a letter dated December 29, 2008, OWCP advised appellant that the evidence submitted was insufficient to establish that he sustained employment-related hearing loss. It requested that he respond to specific questions, and provide copies of all medical examinations pertaining to hearing problems. OWCP also sent a letter to the employing establishment on December 29, 2008. It requested that the employing establishment provide information in its possession relevant to appellant's claim, including copies of all medical examinations in its possession pertaining to hearing loss, as well as a statement from a knowledgeable supervisor regarding details of his exposure to hazardous noise.

Appellant did not submit any medical evidence in support of his hearing loss claim. OWCP also did not receive any of the requested information from the employing establishment.

In a decision dated February 23, 2009, OWCP denied appellant's claim finding that he had failed to submit any evidence to establish hearing loss as a result of factors of his employment.

Following the February 23, 2009 denial decision, on March 2, 2009 OWCP received numerous documents from the employing establishment, including various employment audiograms dated July 5, 1990 until December 21, 2005. It also provided appellant's July 1990 application for employment. A summary of the audiograms indicated that appellant's hearing loss had progressed from July 5, 1990 until December 21, 2005. In July 1990, his left ear hearing loss at the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second was recorded as 0, 5, 10, and 5 decibels; while his right ear loss was recorded as 5, 0, 5, and 10 decibels. Audiometric results were provided for the years 1990 through 2005. The December 21, 2005 audiometric results indicated that appellant's hearing loss had progressed. His left ear hearing loss was recorded as 15, 35, 45, and 40 decibels; while his right ear hearing loss was recorded as 10, 35, 55, and 50 decibels.

In a January 8, 2009 statement, Bobby Barrow, an operations manager at the employing establishment, stated that appellant worked for the employing establishment from July 7, 1990 to March 16, 2006 as a custodian, Student Generating Plant Operator Training, and assistant unit operator. He noted that appellant worked around boiler feed pumps and coal pulverizers for four to six hours a day, five days a week and that the noise level readings for these jobs were 71 to 90 decibels. Mr. Barrow reported that hearing protection had been provided by the employing establishment since 1973 and that appellant wore hearing protection from the time he began to work for the employing establishment. He believed that based on this information there was reasonable doubt that appellant had current hearing loss as a result of his federal employment.

In a February 26, 2009 statement, Whitney R. Mauldin, an audiologist, reviewed appellant's employment history and audiograms. She stated that upon review of his work history and audiometric record there was no evidence to establish fact of injury. Ms. Mauldin related that appellant's July 5, 1990 baseline hearing examination for the employing establishment demonstrated high frequency hearing loss at the right ear. She opined that this asymmetry had persisted since his hire and was suggestive of a possible medical condition contributing to the decline of his overall auditory function that was inconsistent with occupational exposure.

In a handwritten letter dated June 3, 2014, appellant requested a copy of the denial letter concerning his hearing loss claim and stated that he intended to appeal it.

In an appeal request form dated August 12, 2014 and received by OWCP on August 18, 2014, appellant requested reconsideration. In an attached handwritten statement, he reported that he was informed that anyone hired after 1990 at the employing establishment would not be eligible for hearing loss compensation due to the fact that earplugs had been provided. Appellant was later told by another employee that the Labor Board determined that earplugs were not adequate enough protection. He explained that had he known about the Labor Board decision he would have pursued his claim further. Appellant contended that he worked in the noisiest place at the employing establishment.

In an August 5, 2014 report, Whitney Cope, an audiologist, examined appellant for reduced hearing sensitivity for the past 8 to 10 years. Appellant described an extensive history of excessive noise exposure while working for the employing establishment from 1990 through 2006. Upon visual examination of appellant's ear, Ms. Cope observed patent ear canals with tympanic membranes being clearly visualized bilaterally. She reported that audiometric test results revealed minimal falling to moderately severe sensorineural hearing loss bilaterally. Ms. Cope diagnosed binaural minimal falling to moderately severe sensorineural hearing loss of hearing sensitivity and abnormal auditory perception and word recognition. She stated that the hearing loss was most likely multifactorial in nature with contributing factors, including, but not limited to, extensive exposure to high level noise and presbycusis. Ms. Cope provided a copy of the audiology test.

By decision dated August 22, 2014, OWCP denied appellant's request for reconsideration as his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP. It determined that the most recent merit decision on record was the February 23, 2009 decision denying his occupational disease claim. Because appellant's request for reconsideration was not received until August 18, 2014, his claim was untimely filed. OWCP further determined that the evidence submitted after the last merit decision was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.² The Board has

² 20 C.F.R. § 10.607.

found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁵ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹ The Board makes an independent determination of whether a claimant has submitted

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ 20 C.F.R. at *supra* note 5; *Fidel E. Perez*, 48 ECAB 663 (1997).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (October 2011).

clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹²

ANALYSIS

The only decision before the Board is the August 22, 2014 nonmerit decision in which OWCP denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to establish clear evidence of error. In a decision dated February 23, 2009, OWCP denied appellant's hearing loss claim. In an appeal request form received by OWCP on August 18, 2014, appellant requested reconsideration. More than one year elapsed from the most recent OWCP merit decision dated February 23, 2009, to his request for reconsideration received on August 18, 2014. Thus, appellant's request for reconsideration was untimely. As the request for review was not timely filed, the Board shall undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.

Pursuant to its obligation to develop appellant's claim, on December 29, 2008, OWCP requested information from the employing establishment, including comments from knowledgeable supervisors regarding work-related noise exposure and the extent and degree of the stated exposure, as well as copies of all reports of medical examinations and audiograms performed during appellant's employment. When the employing establishment failed to respond to its request for additional information, it denied appellant's claim on the grounds that he failed to submit sufficient evidence to establish his claim. The Board finds that OWCP's failure to consider the evidence from the employing establishment of annual audiometric examinations as well as the results of these tests constituted error.¹³

Subsequent to the denial of appellant's claim on February 23, 2009, the employing establishment submitted numerous documents to OWCP on March 2, 2009 which generally supported his hearing loss claim, including audiograms covering the period of his employment, physician's reports, and memoranda from the employing establishment verifying his exposure to hazardous noise in the workplace. This evidence was not in the record on February 23, 2009, but was clearly available prior to its submission by the employing establishment. Appellant also submitted evidence in support of his claim. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program was sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury.¹⁴

An employing establishment reluctance or refusal to submit requested evidence relating to an employee's hearing loss claim in a timely manner should not be an impediment to a successful prosecution of the claim.¹⁵ In the present case, the type of information that had been

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹³ *See R.H.*, Docket No. 12-102 (issued May 17, 2012); *see also Melvin James*, 55 ECAB 406 (2004).

¹⁴ *See James A. Sheppard*, 55 ECAB 515 (2004).

¹⁵ *See Jerome J. Kubin*, Docket No. 03-1830 (issued October 1, 2003).

sought, namely employing establishment audiograms, is normally within the custody of the employing establishment and not readily available to appellant. OWCP procedures provide that if an employing establishment, in connection with a recognized environmental hazard, has an employing test program and a test shows the employee to have positive findings, this should be accepted as constituting actual knowledge. For example, an employing establishment where employees may be exposed to hazardous noise levels may give annual hearing tests for exposed employees. A hearing loss identified on such a test would constitute knowledge on the employing establishment of a possible work injury.¹⁶ Accordingly, appellant should not be penalized for the employing establishment's failure to submit such information in a timely manner.¹⁷ Had the audiograms and other evidence supporting his noise-induced hearing loss been received prior to the February 23, 2009 decision, proper procedure would have compelled OWCP to further develop the case by obtaining a second opinion report from a medical specialist.¹⁸

The Board finds that the evidence submitted by the employing establishment following the merit denial of appellant's claim shifted the weight of the evidence in this case in favor of him, as it offers clear support of his claim and raises a substantial question concerning the correctness of the decision.¹⁹ The case must therefore be remanded for OWCP to evaluate all of the evidence submitted by the employing establishment and appellant, to be followed by such further development as appropriate.²⁰

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3(a)(3)(c)(March 1993).

¹⁷ *See Id.*

¹⁸ *R.H.*, *supra* note 13.

¹⁹ *See W.D.*, Docket No. 07-2002 (issued January 14, 2008).

²⁰ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2014 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further proceedings consistent with this opinion, which includes a full review of the evidence under the proper, timely standards of a merit review.

Issued: April 17, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board